A **PENGURUSAN DANAHARTA NASIONAL BHD**

v.

TANG KWOR HAM & ORS AND ANOTHER APPEAL

B FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
ALAUDDIN MOHD SHERIFF FCJ
ABDUL AZIZ MOHAMAD FCJ
[CIVIL APPEAL NOS: 02-40-2006 (M) & 02-43-2006 (M)]
C 6 JULY 2007

ADMINISTRATIVE LAW: *Judicial review - Application against Pengurusan Danaharta Nasional Berhad - Whether s. 72 of Pengurusan Danaharta Nasional Bhd Act 1998 ousted jurisdiction of court to hear*
D *application*

In both the appeals herein, the primary issue for determination before the Federal Court was whether s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act') ousted the jurisdiction of the court in an application for judicial review against
E the first appellant, Pengurusan Danaharta Nasional Bhd ('Danaharta'). [*See Court of Appeal decision in [2006] 1 CLJ 927 and High Court decision in [2003] 7 CLJ 205.*]

Held (allowing the appeals)
F **Per Alauddin Mohd Sheriff FCJ delivering the judgment of the court:**

(1) Although the authorities dealt with applications for injunction, the principles therein were equally applicable to *certiorari* and
G *mandamus* applications. Therefore, in the present case judicial review by way of *certiorari* was not available by reason of s. 72 of the Act. Section 72 clearly prohibits an order of court which stays, restrains or affects the powers and any action taken or proposed to be taken by Danaharta, the Special
H Administrators or Independent Advisors under the Act. Following the Federal Court decision in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*, s. 72 is valid and constitutional and any order that denies the quick and efficient disposal of property within the framework of the Act is void. Hence, the
I orders of the Court of Appeal ran foul of s. 72 of the Act and were unsustainable. (paras 50, 51, 52 & 53)

Bahasa Malaysia *translation of headnotes*

Dalam kedua-dua rayuan di sini, isu utama yang berbangkit untuk keputusan Mahkamah Persekutuan adalah sama ada s. 72 Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta') telah mengingkir bidangkuasa mahkamah dalam satu permohonan semakan kehakiman terhadap perayu pertama, Pengurusan Danaharta Nasional Bhd ('Danaharta'). [*Lihat keputusan Mahkamah Rayuan di [2006] 1 CLJ 927 dan keputusan Mahkamah Tinggi di [2003] 7 CLJ 205.*]

Diputuskan (membenarkan rayuan-rayuan)
Oleh Alauddin Mohd Sheriff HMP menyampaikan penghakiman mahkamah:

(1) Walaupun autoriti-autoriti adalah berkaitan dengan permohonan-permohonan untuk injunksi, prinsip-prinsip di dalamnya turut terpakai untuk permohonan-permohonan *certiorari* dan *mandamus*. Oleh itu, dalam kes semasa, semakan kehakiman melalui *certiorari* tidak boleh diguna disebabkan oleh s. 72 Akta. Seksyen 72 jelas melarang suatu perintah mahkamah yang menangguh, menghalang atau menjejaskan kuasa-kuasa dan apa-apa tindakan yang diambil atau hendak diambil oleh Danaharta, Pentadbir-Pentadbir Khas atau Penasihat-Penasihat bebas di bawah Akta. Mengikuti keputusan Mahkamah Persekutuan di dalam *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*, s. 72 adalah sah dan berperlembagaan dan apa jua perintah yang menghalang pelupusan cepat dan efisyen hartanah di dalam rangkakerja Akta adalah tak sah. Dengan itu, perintah-perintah Mahkamah Rayuan telah melanggari s. 72 Akta dan tidak boleh dipertahankan.

Case(s) referred to:
Chor Phaik Har v. Farlin Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(foll)***
DYTM Tengku Idris Shah Ibni Almarhum Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Chan Teik Huat [2002] 2 CLJ 57 FC ***(refd)***
Hokkien Cemeteries, Penang v Majlis Bandaran Pulau Pinang [1979] 2 MLJ 121 ***(refd)***
JP Berthelsen v. Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 ***(refd)***
Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor [2002] 7 CLJ 175 HC ***(refd)***

A *Lau Kong Co Ltd v. Thong Guan Co Pte Ltd [2004] 4 MLJ 1* ***(refd)***
Mohamed Nordin Johan v. Attorney General, Malaysia [1983] 1 MLJ 68 ***(refd)***
South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union [1981] AC 363 ***(refd)***
B *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors [2002] 2 CLJ 758 HC* ***(refd)***
Tuan Hj Sarip Hamid & Another v. Patco Malaysia [1995] 3 CLJ 627 SC ***(refd)***
Wong Koon Seng v. Rahman Hydraulic Tin Bhd & Ors [2003] 5 CLJ 205 HC ***(refd)***

C **Legislation referred to:**
Courts of Judicature Act 1964, s. 96
Federal Constitution, art. 8
Interpretation Acts 1948 and 1967, s. 17A
D Pengurusan Danaharta Nasional Berhad Act 1998, ss. 22(4), 24, 25A(3), 41(7), 44, 45, 46, 47, 57, 72
Rules of the High Court 1980, O. 53 rr. 2(4), 3(2)

(Civil Appeal No: 02-40-2006 (M)
For the appellant - Jeyanthini Kannperan (Sathya Kumardas with her); M/s Shearn Delamore & Co
E *For the 1st respondent & 2nd respondent - Lim Whei Chun; M/s Lim Whei Chun*
For Asian Pacific Management Insight Sdn Bhd - B Thangaraj

(Civil Appeal No: 02-43-2006 (M))
F *For the appellant Dato' Mary Lim Thiam Suan, SFC (Suzana Atan with her)*
For the 1st respondent & 2nd respondent - Lim Whei Chun; M/s Lim Whei Chun
For Asian Pacific Management Insight Sdn Bhd - B Thangaraj

Reported by Usha Thiagarajah
G

JUDGMENT

Alauddin Mohd Sheriff FCJ:

H ### Introduction

[1] There were two (2) appeals before us. The first is Rayuan Sivil No. 02-40-2006 (M) and the second is Rayuan Sivil No. 02-43-2006 (M). The appellant in the first appeal is Pengurusan I Danaharta Nasional Berhad (Danaharta) and the appellant in the second appeal is the Attorney General. The respondents in both appeals are Tang Kwor Ham, Lee Tuck Kwai and Tang Sheit Fun.

[2] On 7 August 2006 the Federal Court granted leave to both appellants pursuant to s. 96 of the Courts of Judicature Act 1964 to appeal against the decision of the Court of Appeal and framed the following questions of law for consideration in the appeal:

Question 1: What is the proper test to be applied in an application for leave for judicial review?

Question 2: What amounts to a decision of a public authority within the meaning of O. 53 Rules of the High Court (RHC) 1980?

Question 3: Does s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 (the Act) oust the jurisdiction of the courts to entertain an application for judicial review?

[3] We heard both appeals on 20 March 2007. Both appeals were allowed with costs to be taxed and the orders of the Court of Appeal were set aside. We also ordered that the deposits be refunded to the appellants.

[4] We shall now give our reasons.

Background Facts

[5] The facts are not really in dispute.

[6] Briefly, the respondents who were also three of the four directors of Tang Kwor Ham Realty Sdn Bhd (the company), the sixth respondent in the original proceedings, held 60% of the shares in the company.

[7] The company had a Non-Performing Loan (NPL) of approximately RM26 million.

[8] On 30 December 1998 Danaharta acquired the NPL. The company became known as an 'affected person' under s. 21 of the Act.

[9] Under s. 24 of the Act, the 2nd, 3rd and 4th respondents in the original proceedings were appointed as the Special Administrators (SAs) of the company.

[10] The company's main assets including land and hotel were identified for sale in order to resolve the company's financial problems.

[11] In keeping with the framework in ss. 44-47 of the Act, the SAs prepared and submitted a workout proposal dated 11 September 2002 to Danaharta who approved the same and the workout proposal was thereafter put before the secured creditors who approved the same at the secured creditors' meeting on 27 September 2002.

[12] The workout proposal recommended that the Grand Hill Hotel owned by the company be sold for RM7.6 million given the two previous unsuccessful tenders and the failure of the interested party proposed by the directors of the company to complete the purchase at RM7.8 million. The respondents claim that the proper value of the property is not less than RM15 million. The sale at RM7.6 million has since been completed.

[13] Dissatisfied with the workout proposal the respondents then filed an application at the High Court on behalf of themselves and by way of representative and derivative action on behalf of the company for the following orders:

1. under O. 53 r. 3 of the RHC 1980, leave for judicial review of the workout proposal prepared by the SAs of the company;
2. under O. 53 r. 3(2), a stay of the implementation of the workout proposal until the adjudication of this judicial review; and
3. costs to be borne by the respondents (the appellants in this appeal).

[14] On 25 June 2003, the respondents' application was dismissed with costs by the High Court.

[15] On appeal to the Court of Appeal against the said decision the Court of Appeal by a majority decision allowed the respondents' appeal on 24 October 2005.

[16] Hence the present appeal to this court.

Findings Of The High Court

[17] At the High Court, the application was heard by Low Hop Bing J, who allowed the appellants to be heard on the respondents' *ex parte* application for leave. Neither appellant filed any affidavits or introduced any new facts on the respondents' application for leave. Instead only written submissions were filed and the respondents did not object to the appellants taking part in the proceedings.

[18] The learned judge, in dismissing the *ex parte* application, held *inter alia* that the workout proposal does not come within the purview of the decision of a "public authority" in O. 53 r. 2(4), but concerns commercial transactions made by persons and bodies who are private entities.

[19] The learned judge also held that the infusion of public element and public interest in the Act does not *ipso facto* make the workout proposal a decision of a public authority.

Decision Of The Court Of Appeal

[20] Upon appeal by the respondents to the Court of Appeal, the appeal was allowed by a majority decision. The order of the High Court was set aside and an order in terms of the *ex parte* motion for leave was granted.

[21] The Court of Appeal (majority decision) held that the High Court should not go into the merits of the case at leave stage. Its role is only to see if the application is frivolous eg, where the applicant is a busybody or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings or if the subject matter of the review is one by settled law non justiciable.

[22] The Court of Appeal (majority decision) rejected the Senior Federal Counsel's submission that the Supreme Court case of *Tuan Hj. Sarip Hamid & Another v. Patco Malaysia* [1995] 3 CLJ 627 had set a different and a higher test than that stated in *Mohamed Nordin bin Johan v. Attorney General, Malaysia* [1983] 1 MLJ 68 and *JP Berthelsen v. Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 and held that a frivolous case is the same thing as a non arguable case.

A **[23]** Having decided that the High Court had erred in going into the 'merits of the application' at leave stage the Court of Appeal (majority decision) itself went further to consider the 'merits of the application' ie, whether the appellant (Danaharta) is in fact amenable to judicial review.

B **[24]** Relying on Indian authorities, the Court of Appeal (majority decision) held that Danaharta was amenable to judicial review. It held that although it is a company incorporated under the Companies Act, it is wholly financed by public funds, is directly C and indirectly under the control of the Minister of Finance and has powers conferred by the Act.

The Appeal Before Us

[25] At the outset of the appeal before us we took the view that D of all the three questions posed for our determination Question 3 is the most relevant and important question to be addressed. Once that is done there is no necessity for us to answer Questions 1 and 2.

E **[26]** We intimated to the parties that for the purpose of this appeal we would only consider Question 3. Parties agreed and we invited counsel to make their submissions on Question 3 only.

[27] Question 3 reads thus:

F > Does section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 (the Act) oust the jurisdiction of the courts to entertain an application for judicial review?

[28] For ease of reference we reproduce s. 72 of the Act as G follows:

> Limits on the grant of orders of court.
>
> 72. Notwithstanding any law, an order of a court cannot be granted:
>
> H (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (b) which stays, restrains or affects any action taken, or I proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

(c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,

and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

[29] In arguing the appeals before us Cik Jeyanthini Kannaperan, learned counsel for Danaharta, and Dato' Mary Lim Thiam Suan, learned Senior Federal Counsel appearing for the Attorney General, took a common stand.

[30] In essence it was contended that s. 72 of the Act prohibits an order of court which stays, restrains or affects the powers and any action taken or proposed to be taken by Danaharta, the Special Administrators or Independent Advisors under the Act.

[31] It was further contended that the order of the Court of Appeal (majority decision) granting the respondents leave to issue an application for *certiorari* to quash the workout proposal, all actions taken and documents prepared in relation to the workout proposal including approval of the workout proposal by the secured creditors of the company coupled with a stay under O. 53 r. 3 runs contrary to s. 72.

[32] On the other hand, Encik Lim Whei Chun, learned counsel for the respondents in opposing the appeal submitted that s. 72 was never intended and understood as something to oust the court's judicial-review jurisdiction.

[33] It was only intended to bar the granting of injunctions by the court against Danaharta. This is supported by the decision of the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701.

[34] Referring to the case of *South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 it was further contended by learned counsel that the word 'quashed' is ordinarily used to describe the result of an order of *certiorari.* Sections 22(4), 25A(3) and 41(7) of the Act where the term "quashed" is employed reveals the understanding that certain entities under the Act are susceptible to *certiorari.* Had s. 72 attempted also to oust *certiorari*, then s. 72 would probably

A have deployed the same strategy of using the phrase "shall not be … quashed." Thus the absence of mention of even the word "quash" is a textual indication that s. 72 does not include the ousting of *certiorari*.

B **[35]** In attempting to answer the question posed we would state from the outset that the Act is a special law specifically enacted to meet an economic exigency. It was passed in the public interest and for the public good. It is not out of place for the courts to take judicial notice of the financial crisis that the world underwent C in the dying years of the last century.

[36] To understand better the special position accorded to Danaharta, it is appropriate for us to refer to the preamble of the Act which reads as follows:

D An Act to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the Corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the Corporation and for matters E connected therewith or incidental thereto.

WHEREAS …

AND WHEREAS legislation is the only means by which the acquisition, management, financing of assets … can be F implemented promptly, efficiently … for the public good:

AND WHEREAS legislation is the only means by which special administrators may be appointed … to administer and manage persons whose assets … have been so acquired:

G AND WHEREAS Pengurusan Danaharta Nasional Berhad has been established as a corporation incorporated under the Companies Act 1965 for such purposes.

[37] The object of the Act was explained in clearer terms in the speech delivered by the then Minister of Finance in Parliament H while introducing the Bill for the Act. The material parts of it (in the original text) read as follows:

I

> … suatu akta untuk memberi kuasa kepada Pengurusan Danaharta Nasional Berhad untuk mengambil alih pinjaman-pinjaman … seterusnya menguruskan pinjaman dan aset serta melaksanakan rancangan menyusun semula aset-aset … .
>
> Dengan itu kerajaan telah memutuskan untuk menubuhkan sebuah syarikat yang dikenali sebagai Pengurusan Danaharta Nasional Berhad … untuk mendapatkan kembali pembayaran ke atas hutang-hutang tersebut.

…

> Untuk berjaya mencapai objektifnya Danaharta perlu berupaya mengurus dan menyelesaikan … Dengan itu syarikat ini tidak boleh beroperasi seperti syarikat biasa dan dikongkong oleh peraturan dan perundangan transaksi perniagaan. Untuk tujuan ini, Danaharta akan ditubuhkan sebagai sebuah syarikat berkanun yang diperbadankan di bawah Akta Syarikat 1965 dengan kuasa-kuasa yang akan diberikan oleh sebuah akta Parlimen. Status sebagai sebuah syarikat berkanun akan memberi Danaharta … kuasa undang-undang yang khusus bagi memenuhi objektifnya.
>
> …
>
> Justeru itu adalah difikirkan wajar kerajaan menggubal sebuah rang undang-undang dengan memberi kuasa-kuasa tertentu kepada Danaharta untuk melaksanakan tugas dan tanggungjawabnya. …

[38] The constitutionality of s. 72 became the subject matter for determination by the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 1 CLJ 701.

[39] In that case the respondent ('Kekatong") was the registered proprietor of certain lands. These lands were charged by way of a third party charge to a bank, which had availed facilities to a borrower. The borrower had defaulted and judgment was entered against him. The bank commenced foreclosure proceedings and obtained an order for sale, which was subsequently, on appeal, set aside. Upon the implementation of the Act, the bank sold the loan and the securities to the respondent ('Danaharta'), in whom, pursuant to the provisions of the Act, the land vested. Kekatong applied to the High Court seeking to restrain Danaharta from exercising any rights under the Act or under the vesting order and with particular regard to s. 57 of the Act and para 5 of the 15th Schedule to the National Land Code ('NLC'). The High Court

refused the injunction on the basis that there were no serious questions to be tried and in any event it had no jurisdiction to grant an injunction by reason of s. 72 of the Act. Kekatong appealed to the Court of Appeal. The Court of Appeal held that s. 72 is unconstitutional as it contravened art. 8 of the Federal Constitution. The appellant appealed to the Federal Court and the issue for consideration was whether s. 72 is unconstitutional.

[40] It was unanimously held by the Federal Court that there was a rational basis between the classification in s. 72 and its object in relation to the Act. Section 72 therefore satisfied the requirements of the reasonable classification test and is not unconstitutional.

[41] In its judgment at p. 286 this is what the court said:

> As the Act itself indicates its object in the preamble and the basis of the classification is evident from the language of s. 72 it falls within the first category as classified in *Shri Ram Krishna Dalmia & Ors v. Shri Justice SR Tendolkar & Ors* AIR [1958] SC 538. It is clear that the Act was required in the public interest to promote the revitalization of the nation's economy. Denial of injunctive relief is absolutely necessary to ensure that the object of the Act is not frustrated. That clearly is the purpose of s. 72 which applies to all persons in the same position as the respondent. Thus, it applies equally to all persons who are similarly circumstanced. This is a reference to all persons whose assets and liabilities have been acquired by the appellant: pursuant to the Act.

[42] Section 17A of the Interpretation Acts 1948 and 1967 (Act 388) provides:

> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[43] The provision of s. 17A above is what is normally referred to as the "purposive approach" in statutory interpretation. The same approach was adopted by the Federal Court in *DYTM Tengku Idris Shah Ibni Almarhum Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Chan Teik Huat* [2002] 2 CLJ 57; *Lau Kong Co. Ltd v. Thong Guan Co. Pte Ltd.* [2004] 4 MLJ 1 and *Hokkien Cemeteries, Penang v. Majlis Bandaran Pulau Pinang* [1979] 2 MLJ 121.

[44] The object of Parliament in enacting this law has been clearly stated in the preamble to the Act. The Act was required in the public interest to promote the revitalization of the nation's economy. It was against this background that the Act was passed by Parliament in July 1998. We find the purpose is clear and unambiguous.

[45] In this regard, a knowledge of the matters considered by the legislature in enacting this law is relevant. Further, it is permissible for the courts, as held by the Federal Court in *Chor Phaik Har v. Farlin Properties Sdn Bhd* [1994] 4 CLJ 285 to resort to the Hansard as an aid to interpretation. We can therefore refer to the policy speech of the then Minister of Finance in Parliament while introducing the Bill to the Act (see para 37 above).

[46] In the case of *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors* [2002] 2 CLJ 758 the provision of section 72 was also considered. In refusing an application for an injunction the learned judge, Vincent Ng J, commented:

> It is incontrovertible that s. 72 constituted a caveat against the granting of a restraining order directed at the courts … Thus, in the present case, I would hold that this court is precluded by the expressed crystal clear provision in s. 72 from granting the injunction or restraining order sought by the plaintiff.

[47] Again, in *Kekatong Sdn Bhd v. Bumiputra-Comerce Bank Bhd & Anor* [2002] 7 CLJ 175, Azmel J (as he then was) held as follows:

> The wordings of s. 72 of the Act are very clear and contain no ambiguity as to its meaning and intention. In the absence of any ambiguity, it is incumbent upon this court to give it its literal meaning.

[48] The same decision was again reflected in the case of *Wong Koon Seng v. Rahman Hydraulic Tin Bhd & Ors* [2003] 5 CLJ 205.

[49] Although the above cases dealt with applications for injunction we agree that the principles therein are equally applicable to *certiorari* and *mandamus* as s. 72 bars not only orders granting injunctions but also *certiorari* and *mandamus* as well.

[50] Coming back to the appeal before us we would reiterate that judicial review by way of *certiorari* is not available by reason of s. 72 of the Act.

A **[51]** Section 72 clearly prohibits an order of court which stays, restrains or affects the powers and any action taken or proposed to be taken by Danaharta, the Special Administrators or Independent Advisors under the Act.

B **[52]** We agree with the submission of learned counsel for the appellants that the orders of the Court of Appeal granting the respondents leave to issue an application for certiorari to quash the workout proposal, all actions taken and documents prepared in relation to the workout proposal including approval of the C workout proposal by the secured creditors of the company, coupled with a stay under O. 53 r. 3 run contrary to s. 72 of the Act.

[53] Following the Federal Court decision in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* (above) that s. 72 is valid and D constitutional and that any order that denies the quick and efficient disposal of property within the framework of the Act is void, it is our unanimous view that the orders of the Court of Appeal run foul of s. 72 of the Act and are unsustainable.

E **Conclusion**

[54] In the result, we would answer the question posed in the affirmative and allow the appeals with costs.

F **[55]** My learned brothers Abdul Hamid Mohamad, FCJ and Abdul Aziz Mohamad, FCJ have seen this judgment in draft and have expressed their agreement with it.

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